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No. 94-574

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,
Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Eleventh Amendment bar a private party from bringing an action under 42 U.S.C. § 1983 against the state official charged with the control and management of state lands, when the purpose of the action is to determine title to lands held and claimed by the state?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Garry Mauro, Commissioner of the General Land Office, and the State of Texas, by and through their attorney, the Attorney General of Texas, file this Brief in Opposition.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below

The John G. & Marie Stella Kenedy Memorial Foundation ("Foundation") originally filed this action on January 9, 1990, in state court in Kenedy County, Texas,

seeking declaratory and injunctive relief against Garry Mauro in his capacity as Commissioner of the General Land Office ("Commissioner") on claims predicated on state common law as well as on 42 U.S.C. § 1983 and the due process clause of the Fourteenth Amendment to the United States Constitution. The Foundation sought an adjudication of title to lands held by the State ("disputed land"). The Foundation also asserted that the State of Texas ("State") had taken the Foundation's property for public use without adequate compensation under Article I, Section 17 of the Texas Constitution and claimed unspecified damages for preexisting oil and gas leases entered into by the State on the disputed land.

On February 12, 1990, the Commissioner and the State removed the action to the U.S. District Court in Corpus Christi, Texas, and raised affirmative defenses, including immunity from suit under the Eleventh Amendment. The Commissioner and the State filed a motion for summary judgment. Thereafter, the Foundation amended its complaint to assert a taking under the Fifth Amendment to the U.S. Constitution. The Foundation filed a motion for partial summary judgment, and the Commissioner and the State filed a supplemental summary judgment motion addressing, among other matters, the Foundation's Fifth Amendment claim. The district court considered all motions at a hearing on October 11, 1991.

On October 1, 1992, the district court entered an Order of Dismissal and a Final Judgment in which it dismissed the entire case for want of jurisdiction. The dismissal of the federal claims was based on a determination that they were barred by the Eleventh Amendment. The district court set out two independent reasons for dismissing the federal claims against the Commissioner: the Commissioner is sued solely in his official capacity for alleged erroneous applications of state law (Petitioner's Appendix at B9 - 12) and the relief sought against the Commissioner is effectively relief against the State and would cause a direct

impact on the State treasury by causing the loss of title to lands held by the State. (Petitioner's Appendix at B12 - 14.)

On October 2, 1992, the district court entered an Order Modifying Order of Dismissal, reaffirming its dismissal of the federal claims on Eleventh Amendment grounds but remanding the Foundation's state law claims to state court. On that same day, the district court entered an Amended Final Judgment consistent with its modified dismissal order and awarded costs to Defendants.

The Foundation appealed the dismissal of its § 1983 claim and its Fifth Amendment takings claim to the Fifth Circuit. The court of appeals held that the district court had erred in touching on the merits of the action by denying the Foundation's motion for partial summary judgment but otherwise affirmed the district court's dismissal of the Foundation's federal claims. The court of appeals based its affirmance of the dismissal of the Foundation's § 1983 claims against the Commissioner on the second ground articulated by the district court -- viz, that the action against the Commissioner was, in effect, an impermissible action to adjudicate the State's interest in property without the State's consent. (Petitioner's Appendix at pp. A9 - 11.) The court of appeals refused the Foundation's request that its Fifth Amendment takings claim be remanded to state court on the ground that the district court lacked statutory authority to remand the federal claim. (Petitioner's Appendix at pp. A15 - 16.)

B. Related state court proceedings

The Foundation correctly notes that, after the district court remanded its state law claims, the Foundation pursued its state law claims in the state court in Kenedy County. It also reasserted its federal claims, although jurisdiction over those matters rested exclusively in the federal courts. The state court sustained Respondents' pleas to the jurisdiction based on sovereign immunity and on the ground that the

federal claims were outside the state court's jurisdiction. The Foundation appealed the dismissal. On October 13, 1994, the parties presented oral argument in the state appellate court, and the court submitted the case for decision.

The Foundation also correctly notes that interpleader actions filed by oil and gas lessees are pending in state court in Travis County, Texas, and that the Foundation has cross-claimed against Respondents, seeking a boundary and title determination as to the disputed land. Respondents dispute the Foundation's assertion that its right to proceed in the Travis County forum is uncertain. (Petitioner's Brief at 8.) The Foundation and Respondents, along with the interpleading lessees, have consolidated the two cases and are moving them forward to final disposition. Respondents filed a motion for summary judgment in the state court proceeding on September 16, 1994. Respondents acknowledge therein that the Foundation has a right to bring a boundary action directly against the State in Travis County under section 33.171 of the Texas Natural Resources Code and assert on the merits that the State's continued ownership of the disputed land is established as a matter of law.

Respondents made these same assertions to the Fifth Circuit and, in fact, raised a ripeness argument in their post-submission brief filed with the court of appeals. The Foundation's suggestion that it may have no means to obtain a title and boundary determination is meritless.

C. The Foundation's misstatements as to state law

In its Statement of the Case, the Foundation presents, without citation to authority, its interpretation of Texas boundary law. The Foundation states broadly that "[f]ast land bordering the Laguna Madre belongs to littoral property owners." (Petitioner's Brief at 4.) While Respondents disagree with the Foundation's claim that the disputed land is fast land, were it so, title would not necessarily vest in the littoral property owners. Littoral property owners must also

establish that the fast land has accreted to their upland properties rather than to the bed of the sea, which is state owned. *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 187 (1958), *opinion on remand*, 328 S.W.2d 920 (Tex. Civ. App.--Waco 1959, no writ). A littoral property owner could also establish title by proving that the water has withdrawn due to reliction, an unlikely theory along the Texas coast, where sea level has been rising for at least the last century. It is Respondents' position that the Foundation cannot establish the disputed land to be fast land and, further, cannot establish any right to the land under either the doctrine of accretion or the doctrine of reliction.

REASONS FOR DENYING THE WRIT

I. The question presented for review is not worthy of this Court's attention.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The Foundation has not demonstrated a special or important reason in this case, and none exists. The issues in this case involve the application of established Eleventh Amendment principles. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II. The Eleventh Amendment bars the Foundation's action against Respondents.

The Foundation's preliminary reason proffered for granting the writ in the case is a criticism of the district court's first ground for dismissal and a suggestion that the court of appeals' opinion is deficient for failing expressly to address the district court's reasoning. The basis for the Fifth Circuit's decision is apparent from the opinion. The court of appeals determined that the Foundation's action against the

Commissioner is barred because the Foundation seeks to adjudicate title against the State. The court of appeals neither adopted nor discussed the district court's reasoning that an action against a state official for an alleged erroneous application of state law fails to give rise to a federal claim. It is apparent from the Fifth Circuit's silence on that issue that the court of appeals' judgment was not based on that prong of the district court's decision.

The Fifth Circuit properly followed this Court's holdings and reasoning in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Those cases make clear that immunity protects against an action that is in reality against the State, even when a state officer is named.

The Foundation's argument that an adjudication of title against the Commissioner would not constitute an adjudication against the State is specious. The Foundation has coupled its action against the Commissioner with a takings action against the State. Clearly, it seeks to make a determination against the Commissioner binding against the State. A determination of title and boundary against the Commissioner, the state official charged with locating the boundary and determining State ownership, would necessarily be binding on the State. (*See* Petitioner's Appendix at A8 - 12.)

III. The Fifth Circuit's decision is consistent with this Court's decisions as well as those of other circuits.

The Foundation's struggle to create the appearance of a conflict with this Court's decisions as well as decisions of other circuits falls short. The Foundation asserts that the court of appeals erred in examining the Foundation's request for relief in determining that its action was, in effect, an

action for relief against the State. The assertion misstates what the Fifth Circuit did and ignores this Court's directives on Eleventh Amendment analysis. The Fifth Circuit examined the Foundation's entire pleading in reaching its conclusion that the Foundation sought a determination of title against the State. (Petitioner's Appendix at A7 - 9.) Moreover, this Court's relevant test involves analysis of the nature of the relief sought. *See Edelman v. Jordan*, 415 U.S. 651, 663-71 (1974) (setting out method for determining whether impermissible retroactive relief is sought). *Edelman* does not merely allow consideration of the relief sought -- it *requires* it.

The Foundation argues that federal courts must accept without analysis its contention that the fiction recognized in *Ex parte Young*, 209 U.S. 123 (1908), is properly employed in this case. This argument is contrary to this Court's ruling in *Edelman* and a host of other cases. *See, e.g., Papasan v. Allain*, 478 U.S. 265 (1986) (claim seeking to require state officials to provide trust income held barred by Eleventh Amendment); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945) (action against state officers to recover gross income tax paid held barred as an action against the state). The Fifth Circuit properly analyzed the relation between the *Ex parte Young* doctrine and the Eleventh Amendment bar. (Petitioner's Appendix at pp. A9 - 14.)

The Fifth Circuit also properly analyzed the narrow exception to Eleventh Amendment immunity carved by this Court in *Treasure Salvors*, 458 U.S. 670 (1982). The Fifth Circuit noted that the plurality recognized that the state officials in *Treasure Salvors* were holding the artifacts "without a colorable claim" to them. (Petitioner's Appendix at A13.) The Fifth Circuit then distinguished this case from *Treasure Salvors* by recognizing that "the State has 'owned' the property at issue in the instant case for the past century, and title was effectively adjudicated in the State in *Humble Oil*." (Petitioner's Appendix at A14.) The Fifth Circuit's

recognition of an exception to Eleventh Amendment immunity for officials holding property in which a state has no colorable claim of title is an appropriate interpretation of the *Treasure Salvors* decision.

The Foundation criticizes the court of appeals' analysis and argues that the reasoning in *Treasure Salvors* should be restricted to *in rem* actions. The reasoning in *Treasure Salvors* does not support such a restrictive interpretation. The cases on which the Foundation relies for its assertion of a conflict in the circuits undermine rather than support the Foundation's arguments. In *Zych v. Wrecked Vessel Believed to be the "Lady Elgin"*, 960 F.2d 665, 669 (7th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 491 (1992), the Seventh Circuit expressly recognized that the "eleventh amendment applies to admiralty *in rem* proceedings," and held that the amendment barred an action to establish ownership of artifacts from a wrecked ship as against a state's claim to them. The court stated that "*Treasure Salvors* is nothing but an application of *Edelman*," and lent no credence to the Foundation's argument that *in rem* cases should be given different Eleventh Amendment analysis than direct actions against state officials. In *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 717 F.2d 6, 8 (1st Cir. 1983), the First Circuit similarly applied the Eleventh Amendment to bar an action to adjudicate ownership of a wrecked vessel claimed by the state.

The Fifth Circuit's characterization of the state claim herein as colorable is not in conflict with the *Zych* and *Maritime Underwater Surveys* decisions. The Fifth Circuit may give the *Treasure Salvors* "colorable claim" requirement a more generous interpretation than is given by the Seventh Circuit in *Zych*. This distinction, however, does not amount to a conflict among the circuits and weighs against a reversal of the Fifth Circuit's decision. It in no way supports the Foundation's request for relief from this Court. The court in *Zych* held that the strength of the state's legal position was

irrelevant and, if the state asserted ownership, that ownership could not be litigated in federal court. *Zych*, 960 F.2d at 670. In *Maritime Underwater Surveys*, the court distinguished *Treasure Salvors* on the ground that the state was not a party in *Treasure Salvors* and noted that the state's interest was directly at issue in the case before it. 717 F.2d at 8. In the instant case, the State is a party and it has asserted ownership to the disputed land. Under the analysis employed by the courts in *Zych* and *Maritime Underwater Surveys*, the Eleventh Amendment bar would apply without regard to whether the State's claim was colorable.

The Fifth Circuit's partial reliance on its decision in *Humble Oil & Ref. Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951), *opinion on rehearing*, 191 F.2d 705 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952) ("*Sun v. Humble*"), for its determination that the State has a colorable claim to the disputed land was appropriate and affords no basis for the granting of this petition. The State disputes the Foundation's attack on that decision and would point out that the Supreme Court of Texas cited the decision with approval in *Luttes v. State*, 324 S.W.2d at 170, 186. The State also disputes the Foundation's claims that the facts and the law have changed since the Fifth Circuit's decision in *Sun v. Humble*. That dispute, however, does not present a question for review by this Court.

CONCLUSION

For the reasons stated, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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